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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

To: The Commission

COMMENTS OF KM COMMUNICATIONS, INC.

KM Communications, Inc. ("KM"), by its counsel, and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits these comments in response to the *Notice of Proposed Rulemaking*[1] in the above captioned proceeding.

I. <u>Introduction</u>.

KM, a minority- and female-owned Illinois corporation, currently: (i) is the licensee of four existing Low Power Television ("LPTV") stations; (ii) is the permittee for several new full service commercial television and FM radio stations, and its principal holds, or proposes to hold

[1] *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264, Notice of Proposed Rulemaking, FCC 97-397 (released November 26, 1997) (hereinafter, the "*NPRM*").

pursuant to settlement agreements on file with the Commission, equity interests in the permittee for several additional new full service commercial television and FM radio stations; and (iii) has applications pending for additional full service commercial television and FM radio stations.

II. Pending Broadcast Applications Filed Before July 1, 1997.

KM strongly supports the Commission's interpretation of Section 309(j)(1), as amended, as it applies to mutually exclusive applications filed before July 1, 1997. The Budget Act, Pub. L. No. 105-33, 111 Stat. 251 (1997) ("Budget Act"), grants the FCC the discretion to use auctions or comparative hearings for pending applications filed prior to this date. However, KM asserts that it would be inefficient for the Commission to develop comparative criteria, which would likely be challenged in court, for so few applications. Auctions will award licenses quicker and will result in the earliest provision of new broadcast services to the public and are therefore in the public interest.

KM further asserts that where two or more mutually exclusive applications were filed with the Commission before July 1, 1997, the Commission must treat such applicants as the only eligible bidders. The Budget Act clearly states that:

> ... [w]ith respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission *before July 1, 1997*, the Commission shall ... *treat the persons filing such applications as the only persons eligible to be qualified bidders* for purposes of such [competitive bidding] proceeding.[2]

It is clear both that Congress intended the Commission to have the authority to conduct auctions

[2] 111 Stat. 251 at Sec. 3002 (emphasis added); *See also*, *NPRM* at ¶ 24 citing H.R. Conf. Rep. 217, 105th Cong. 1st Sess. 573 (1997) at 573-74.

to resolve mutually exclusive applications filed before July 1, 1997, and that the only eligible bidders are those applicants that filed their applications prior to July 1, 1997. As the Commission states in the *NPRM*, the Commission is prohibited "from opening an additional filing window for new mutually exclusive applications or including as eligible bidders, applicants who filed mutually exclusive applications filed [*sic*] after June 30, 1997." *NPRM* at ¶ 25. The Commission, therefore, is precluded from allowing additional parties to file applications, even in instances where two or more exclusive applications were on file before July 1, 1997 but no A cut-off list has been issued.[3]

III. Refunding Fees to Applicants Not Participating in Auction.

KM strongly supports the Commission's proposal to "refund, upon request, all hearing fees paid by applicants in proceedings in which [the Commission] select[s] the permitee by competitive bidding ... [and] refund, upon request, filing fees paid by those applicants choosing not to participate in the auction." *NPRM* at ¶ 16. However, these refunds should be paid upon dismissal of the applications of the unsuccessful bidders and not "once grant of the construction permit to the winning bidder is final and the license has been paid for in full." *Id.*

An applicant that is not participating in the auction and whose application is dismissed does not have any control over when, or if, a winning bidder pays for the construction permit. Furthermore, an applicant whose application is dismissed and the dismissal is final no longer has standing to participate in or comment on the pending proceeding. Therefore, delaying the refund

[3] For example, KM (FCC File No. BPCT-960930LW) and eight (8) other applicants filed applications for a construction permit for a new Television Station on Channel 51 at Jackson, Mississippi prior to July 1, 1997. Even though no A cut-off list has been issued, those nine (9) applicants must be the only applicants permitted to participate in an FCC auction, or to participate in a universal settlement during the 180-day settlement window.

based on the acts of a third party is inequitable, and the dismissing applicant should receive its refund for its hearing fees and its filing fees as soon as the dismissal of its application is final.

Furthermore, since filing fees ostensibly compensate for the Commission's processing of the applications, filing fees should be refunded to applicants that participate in the auction but are not the high bidders, since the Commission will not process their long form applications (FCC Form 301). Therefore, all applicants should receive their refunds upon dismissal of their applications.

IV. Settlements for Applications Subject To Section 309(l)

Section 3002(a)(3) of the Budget Act, which added new Section 309(l) to the Communications Act regarding the treatment of competing applications for construction permits for new commercial radio or television stations filed before July 1, 1997, included very broad language directing the Commission to waive its regulations to permit settlements among those applicants. *See* 47 U.S.C. § 309(l)(3); *see also* Budget Act at 3002(a)(3). The relevant subsection states that the Commission shall:

> waive <u>any</u> provisions of its regulations <u>necessary</u> to permit such [applicants] to enter into an agreement to procure the removal of a conflict between their applications during the 180-day period beginning on the date of enactment of the Balanced Budget Act of 1997.

Id. KM urges the Commission to read this Congressional directive as broadly as it appears to be intended, with the only apparent limiting factor being whether the requested waiver is "necessary" to achieve the settlement. KM agrees that the Commission should permit: (i) applicants to be paid more than their out-of-pocket expenses and (ii) "white knight" settlements (i.e., where a non-applicant would receive the permit).

In the *NPRM*, the Commission proposes to accept petitions to deny pending broadcast applications only after the applicant is the successful bidder at an auction, so as to not expend its resources evaluating petitions filed against applications that would not otherwise be granted in any event, and suggests that it will no longer accept or process petitions to deny that may be filed against pending broadcast applications.[4] KM requests that the Commission clarify whether it will accept petitions to deny filed against pending broadcast applications; furthermore, if the Commission does have such a policy, KM urges the Commission to accept petitions to deny applications where resolution of such petitions would permit a universal settlement among the remaining competing applicants.

V. **Settlements for Applications Not Subject to Section 309(l).**

KM respectfully disagrees with the Commission's tentative conclusion that Congress "established auctions as the preferred method of awarding spectrum licenses where mutually exclusive applications are accepted" and therefore the Commission must prohibit settlements between parties to resolve mutual exclusive applications. *NPRM* at ¶ 45. It would be against the public interest for the Commission to prohibit parties from entering into settlement agreements and require that all permits and licenses be awarded by auction. Permitting parties to settle their disputes privately, without government intervention, is in the public interest as it encourages the rapid deployment of new broadcast services.

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[4] *See NPRM* at ¶ 37. KM notes that the Commission did not include an order in its ordering clauses ordering parties to not file petitions to deny pending broadcast applications. *Compare NPRM* at ¶ 111 (ordering that the Commission will not accept new or major modification applications for any commercial broadcast or secondary broadcast service).

Further, contrary to the Commission's conclusion, there is nothing in the Budget Act that indicates that Congress discourages applicants from resolving mutually exclusive applications without Commission intervention, nor does Congress indicate in the Budget Act that FCC auctions are preferred over private settlements for awarding mutually exclusive spectrum licenses. Accordingly, applicants should continue to be permitted to reach settlements that comply with Section 73.3525 of the Commission's rules, 47 C.F.R. § 73.3525, for example where an applicant receives only its documented out-of-pocket expenses or the applicants propose a bona fide merger settlement, even after the 180 day settlement window.

VI. <u>The Auction Process</u>.

KM adamantly opposes any proposal to reopen a filing window to permit additional applications to be filed for a permit where a filing window was previously opened and has already closed, even for applications filed after July 1, 1997. *See NPRM* at ¶ 42. Applicants that filed applications during any such window had a reasonable expectation that the parties filing by the applicable cut-off date would be the only applicants eligible for the permit. Reopening the filing window to permit additional applications would be arbitrary and capricious, and at the very least inequitable, particularly for applications filed during windows which closed prior to the November 26, 1997 release of the *NPRM*.

The Commission proposes that after the close of an auction, it will release a Public Notice announcing the high bidders, and setting the date for the high bidder to file any amendments and to deposit with the Commission the amount to increase its upfront payment to a 20% downpayment. *See NPRM* at ¶ 37. After the high bidder makes its downpayment, the Commission would then release another Public Notice setting the deadline for any petitions to deny the high bidder's application. *Id.* KM requests that the Commission clarify that if the high bidder's application has already been through a petition to deny period (for example, after an A cut-off list for television applications) that it would not be subjected to a new petition to deny period. It would be inequitable to subject such an applicant to the "double jeopardy" of a renewed petition to deny period.

VII. Minimum Opening Bids Are Against the Public Interest.

The Budget Act directs the Commission to establish reserve prices and minimum opening bids, unless the Commission finds that it would be against the public interest. KM opposes the Commission's tentative decision to establish a minimum opening bid or reserve price for auctionable broadcast licenses because the auction itself assumes that the parties will determine the value of the spectrum. It is not in the public interest for the Commission to mandate the value applicants place on the spectrum subject to auction. Neither the Commission's proposed transactional model nor its financial model are suitable models for determining a reserve price or minimum opening bid, since both would be based on the values of an operating station, which necessarily have an increased value as an operating business.

A reserve price or minimum opening bid would be particularly inequitable and not in the public interest for applications filed prior to the November 16, 1997 release of the *NPRM*, or prior to July 1, 1997. Such applicants could not reasonably have expected to bid at auction for the permits for which they had applied, and dismissing their applications because none of the parties were willing to bid some artificial price set by the Commission would be inequitable.

VIII. <u>The Commission Is Obligated to Use Settlements to Avoid Mutual Exclusivity</u>.

The Commission's general authority to award broadcast construction permits and licenses through competitive bidding does not nullify the Commission's obligations in Section 309(j)(6)(E) of the Communications Act, 47 U.S.C. § 309(j)(6)(E).[5] In fact, Congress explicitly states that the Commission may utilize competitive bidding only if mutual exclusivity cannot be resolved through "engineering solutions, negotiations, threshold qualifications, service regulations, and other means in order to avoid mutually exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E). Therefore, KM respectfully submits that the Commission must amend its anti-collusion rules to permit applicants to negotiate the removal of mutually exclusive applications by means of settlement agreements.

Under the Commission's proposed procedures, entities will file a short-form application for initial broadcast licenses in response to an announced filing window, and the Commission will determine the mutually exclusive groups of applications and issue a public notice identifying the mutually exclusive applicants who are eligible to bid for an initial construction permit or license. *NPRM* at ¶¶ 68-71. KM proposes that the Commission afford these mutually exclusive applicants the period from the release of such public notice until the date upfront payments are due to reach and file with the Commission settlement agreements consistent with Section 73.3525 of the Commission's rules, 47 C.F.R. § 73.3525, for removing application conflicts (i.e., limited to expenses or bona fide mergers). Permitting applicants to negotiate settlements is consistent with the Commission's anti-collusion rules since although the Commission's rules

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[5] The Budget Act specifically states that the Commission may utilize competitive bidding to award construction permits "[i]f [it is] consistent with the obligations described in paragraph (6)(E)... ." Budget Act at § 3002(a)(1).

preclude the applicants from discussing the substance of their bids or bidding strategies with other bidders, these limitations do not preclude applicants from discussing bona fide mergers and settlements.

KM recognizes that the Commission has a strong interest in maintaining the integrity of its auction processes and the Commission should impose harsh penalties on entities that violate these rules. However, the Budget Act explicitly authorizes the Commission to conduct auctions to award broadcast construction permits if it has satisfied its obligation to use negotiations and other means to solve mutual exclusivity in application proceedings.

IX. Designated Entities.

As a one hundred percent (100%) female and minority owned business (and possibly a small business depending on the criteria selected for defining small businesses), KM strongly supports any provision(s) the Commission adopts to assist designated entities. However, KM recognizes the difficulties the Commission faces by attempting to construct rules that pass Constitutional muster. KM urges the Commission to implement rules that award bidding credits to minority-owned and women-owned businesses in order to ensure that such businesses are given the opportunity to participate in broadcast services. KM asserts that substantial bidding credits would be the best method of assisting such entities, with bidding credits of at least twenty-five percent (25%) and preferably up to fifty percent (50%). Further, KM asserts that the Commission should adopt strict standards when establishing the criteria for eligibility as a designated entity.

The Commission proposes that for a period of five (5) years following Program Test Authority, a licensee that won a license at auction and who was awarded a bidding credit (or other preference) must certify annually that it continues to be eligible for such credit or provision. The Commission also proposes to adopt rules that prohibit the FCC from approving a transfer or assignment of a license from an entity that was awarded a bidding credit to an entity that is ineligible for this same bidding credit, or from approving other ownership changes (during that five year period) that render the licensee ineligible for a previously awarded bidding credit or other provision unless the party or parties reimburse the Treasury for the previously awarded bidding credit. *NPRM* at ¶ 95.

KM believes that this five (5) year holding period is too long. Due to the rapid changes in the broadcast industry, a shorter holding period of two (2) or three (3) years is more appropriate. This shorter holding period will ensure that only bona fide eligible entities receive bidding credits, but it will not lock these designated entities into retaining licenses they either do not wish to, or cannot afford to, maintain.

X. <u>Conclusion</u>.

Wherefore, the above-premises being considered, KM respectfully requests that the Commission adopt broadcast auction rules that are not inconsistent with the comments raised herein.

Respectfully submitted,
KM COMMUNICATIONS, INC.

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January 26, 1998

CERTIFICATE OF SERVICE

I, Laura Ann Campbell, do hereby certify that I have, this 26th of January, 1998, caused to be sent by hand delivery copies of the foregoing "Comments of KM Communications, Inc." to the following:

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